



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 21, 2003

Ms. Laura Garza Jimenez  
County Attorney  
Nueces County  
901 Leopard, Room 207  
Corpus Christi, Texas 78401-3680

OR2003-8401

Dear Ms. Jimenez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191375.

The Nueces County Sheriff's Department (the "sheriff") received a request for personnel, internal affairs, and discipline records pertaining to a named former employee. You indicate that the sheriff has redacted some information from the submitted documents pursuant to a previous determination issued by this office in Open Records Decision No. 670 (2001). *See* Open Records Decision No. 670 (allowing a governmental body to withhold information within the scope of the statutory predecessor to section 552.117(a)(2) without the necessity of requesting an attorney general decision); *see also* Gov't Code § 552.301(a) (allowing a governmental body to withhold information that is subject to a previous determination). You claim that portions of the remaining information are excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing the internal affairs information submitted as Exhibit 1. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." We note that where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108).

You state that the internal affairs information submitted as Exhibit 1 relates to an open and pending criminal investigation being conducted by the Federal Bureau of Investigation ("FBI"). You further state that the sheriff was served with a federal subpoena that requested production of all internal affairs investigations, and that the United States Attorney's Office for the Southern District of Texas advised the sheriff that the subpoena was related to the pending FBI investigation. Based on your representations and our review of the submitted information, we agree that you have demonstrated that release of the information in Exhibit 1 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, we determine that the sheriff may withhold the information in Exhibit 1 from disclosure based on section 552.108(a)(1) of the Government Code.<sup>1</sup>

We next address your claimed exceptions with respect to the remainder of the information at issue, submitted as Exhibit 4. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The personnel information in Exhibit 4 includes the officer's W-4 form. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The submitted W-4 form is tax return information and is therefore excepted from disclosure under section 552.101 of the Government Code as information made confidential by federal law.

Exhibit 4 also contains the officer's Employment Eligibility Verification, Form I-9, and appended information. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the Form I-9 in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we determine that the I-9 form and the information attached thereto is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Next, Exhibit 4 contains an L-2 Declaration of Medical Condition and an L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law

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<sup>1</sup>Based on this finding, we do not reach your claim under section 552.103 of the Government Code for the internal affairs information in Exhibit 1.

Enforcement Officer Standards and Education ("TCLEOSE") that are confidential pursuant to section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

The sheriff must withhold the marked declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

The information in Exhibit 4 also contains fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code.<sup>2</sup> Sections 560.001, 560.002, and 560.003 provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

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<sup>2</sup>We note that Sections 559.001, 559.002, and 559.003 of the Government Code were renumbered as sections 560.001, 560.002, and 560.003 of the Government Code by the 78th Legislature, effective September 1, 2003. See Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2(78), 2003 Tex. Sess. Laws 4140, 4144.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Upon review, we find section 560.002 does not permit the disclosure of the submitted fingerprint information in this instance. Therefore, the sheriff must withhold the fingerprints, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Next, criminal history record information ("CHRI") is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies).<sup>3</sup> Therefore, the sheriff must

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<sup>3</sup>However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2)(B).

withhold any CHRI falling within the ambit of these state and federal regulations pursuant to section 552.101 of the Government Code.

You also indicate that portions of Exhibit 4 are excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.102 claim in the context of the doctrine of common-law privacy under section 552.101 of the Government Code.

Common-law privacy, as encompassed by section 552.101, protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, see Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we find that a portion of the submitted information, which we have marked, is protected by common-law privacy and must be withheld under section 552.101 on that basis. As for the remaining information, we find that, even if it could be considered highly intimate or embarrassing, it is of legitimate public concern. See Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in job qualifications and performance and circumstances of public employee), 405 at 2-3 (1983); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus the sheriff may not withhold any of the remaining information pursuant to section 552.101 in conjunction with common-law privacy.

We note that the sheriff may be required to withhold a small portion of the information in Exhibit 4 pursuant to section 552.1175 of the Government Code. Section 552.1175 applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure and provides in pertinent part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). The submitted personnel records contain the home address and telephone number of a peace officer employed by another agency. Thus, if the officer at issue made a proper section 552.1175 election, the sheriff must withhold the information that we have marked pursuant to section 552.1175. Otherwise, the sheriff must release the information that we have marked pursuant to section 552.1175 of the Government Code.

Finally, we note that Exhibit 4 contains information that is excepted under section 552.130 of the Government Code. Section 552.130 provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

The submitted documents contain Texas driver's license and motor vehicle title and registration information that must be withheld under section 552.130 of the Government Code. However, information relating to driver's licenses and motor vehicle titles or registrations issued by another state may not be withheld under section 552.130.

In summary, the sheriff may withhold the internal affairs information submitted as Exhibit 1 in its entirety pursuant to section 552.108(a)(1) of the Government Code. We have marked tax return information and the named former employee's I-9 form and attachments that must be withheld under section 552.101 of the Government Code in conjunction with federal law.

The marked TCLEOSE declarations must be withheld under section 552.101 in conjunction with section 1701.306 of the Occupations Code. The marked fingerprint information must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code. Criminal history record information must be withheld pursuant to section 552.101 in conjunction with chapter 411 of the Government Code and federal regulations. We have marked information that must be withheld pursuant to section 552.101 in conjunction with the doctrine of common-law privacy. We have marked information that the sheriff must withhold pursuant to section 552.1175 of the Government Code, provided the peace officer to whom the information relates made a proper election under section 552.1175. Otherwise, the sheriff must release this information. The marked information relating to Texas driver's licenses and Texas motor vehicle titles and registrations must be withheld under section 552.130 of the Government Code. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/sdk

Ref: ID# 191375

Enc: Submitted documents

c: Mr. Anthony Tijerina  
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(w/o enclosures)